



Department of Law Monthly Report

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Collections & Support

2003 PFD Garnishment Collects \$2.73 Million

With the receipt of the first batch of permanent fund dividends, the collections unit has traditionally seen the largest monthly collections in the month of October. This year was no exception. To date, the unit has received payments totaling \$2.73 million from the 2003 PFD garnishment and has begun posting those payments to the collections database. In addition, the unit continued to receive new civil judgments for collection, including two new APOC cases and one civil case. On the criminal side, the unit sent 33 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues.

Unit Collects \$166,000 in Victim Restitution Payments

The collections unit received payments totaling \$99,367.03 toward criminal restitution judgments and payments totaling \$67,066.65 toward juvenile restitution judgments this month. We opened 101 criminal and 69 juvenile restitution cases for collection. Initial notices were sent to 438 recipients. Forty-three judgments were paid in full, and satisfactions of

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judgment were filed. We requested 396 disbursement checks, and issued 246 checks to recipients. Quarterly reports on restitution collection were prepared for the Division of Juvenile Justice, the District Attorney's Office, and the Department of Corrections.

Court Enters Favorable Modification Order

AAG Kevin Williams obtained a favorable order in a child support modification proceeding in the *Cutbirth* case. In December 1994, the court ordered the obligor to pay child support of \$556 per month. CSED later initiated a review of the support order to determine whether a modification was appropriate. CSED notified both parents of the review and requested financial information. The obligor did not respond. Therefore, using Department of Labor and Permanent Fund Dividend records and COLA information for the obligor's federal wages, CSED calculated the obligor's child support obligation at \$822 per month.

The obligor responded by pointing out that he did not receive a COLA. He also identified several other businesses, including a charter fishing operation and a snowplow business, but he gave little information about these enterprises and asserted that they did not produce income. The obligor did not provide income tax returns because he had not filed returns for several years. Nevertheless, based on this new information, CSED recalculated the support amount. CSED imputed income from the charter fishing and snowplowing business based on Occupational Employment and Wage estimates for similar businesses and dropped the COLA from its calculation. CSED then proposed a monthly support obligation of \$1,182 per month.

Just prior to the initial hearing, CSED learned that the obligor was receiving disability payments in the amount of \$15,492. The obligor initially denied receiving disability, but

under cross-examination, he admitted that he did receive the pay. Prior to the second hearing, the obligor submitted copies of his back tax returns. Those returns reflected a \$20,000 a year loss for the charter fishing business in 2002. Citing *Gallant v. Gallant*, CSED objected to offsetting the loss from self-employment against "hard" wages from the federal and state jobs. The obligor argued that Gallant only applied to tax shelters and that since his charter fishing business was not set up to dodge taxes, *Gallant* did not apply.

The court agreed with CSED that Gallant applied and disallowed offsets from the self-employment losses. Citing *Bergstrom v. Lindback*, the court also held that since losses from his fishing charter business were not allowed, the taxes (and corresponding deductions) had to be imputed to these additional monies and deducted from the income. The final order held that obligor should pay \$974 per month for one child.

Personnel

Abraham Weiss started as the new Administrative Clerk II in the Collections Unit and we are glad to have him with us.

Commercial & Fair Business

Alaska Commission on Postsecondary Education

In the never ending saga of *Virginia Hardham v. ACPE, University of Oregon, et al.*, Hardham appealed numerous rulings by Judge Michalski to the Alaska Supreme Court. No briefing schedule has yet been ordered because Hardham has yet to pay the filing fee and cost bond claiming poverty as the reason for her request that they be waived. She initially requested that she be allowed to appeal at public expense.

The court initially ordered that Hardam would not have to transcribe the hearing and she would not have to file bound briefs with the court, but she would have to pay the filing fee and cost bond. She filed a motion for reconsideration asking for additional time to pay the filing fee and cost bond (until April 15, 2004). She then asked the court to either appoint an attorney to help her prepare her appeal or to order sanctions against AAG Mary Ellen Beardsley for allegedly conspiring with the other defendants to get the lower court case dismissed. The court has now ordered her to pay a reduced filing fee and cost bond by January 1, 2004 and denied all other requests. If she fails to pay these amounts the appeal will be dismissed.

Telemarketer Enters Into Assurance of Voluntary Compliance

Alaska Glass Service, a Washington corporation which telemarketed its glass repair and replacement services in Anchorage, Juneau, and Fairbanks, has entered into an assurance of voluntary compliance (AVC). In the AVC, the State alleges that Alaska Glass failed to register as a telemarketer as required by the Telephone Solicitation Act and failed to abide by Alaska's do not call law (commonly called the "Black Dot" law). Alaska Glass agreed to stop doing business in Alaska and to pay \$5,000 to the State for consumer protection, education, and enforcement.

Consumer Fraud Case Against Mortgage Broker Reaches Settlement

In September 2001, the state sued City Mortgage Corporation and James Crawford for violations of the Consumer Protection Act and for fraud. The Corporation subsequently was involuntarily dissolved and a default judgment was entered against it. The claims against Crawford individually were settled recently through an agreement which, in part, provides for dismissal of the complaint as long as Crawford makes payments to the state for

consumers who lost money held in escrow by City Mortgage.

Hearing Officer Recommends Three Year Suspension of Midwife's License

On October 20, 2003, a hearing officer issued a proposed decision, recommending a three-year license suspension for Kodiak midwife Susan Kathleen Short. The recommendation was based on Short's breach of a Memorandum of Agreement (MOA) entered into with the Board of Certified Direct-Entry Midwives in 2001. In the MOA, Short agreed to voluntarily suspend her license until she met certain continuing education requirements. The Division of Occupational Licensing invoked the automatic suspension provision in the MOA when an investigation determined that Short had been practicing as a midwife during the period of her voluntary suspension.

Short requested a hearing, which occurred in Kodiak on December 17, 2002 and March 13-14, 2003. The hearing officer determined that Short intentionally practiced midwifery while her license was suspended and, with one client, created a false receipt to hide that fact. The Board will consider the proposed decision at its next meeting. AAG Robert Auth represented the Division in this proceeding.

Disciplinary Hearing Concludes Against Associate Broker

A disciplinary hearing against Anchorage associate real estate broker Bonnie Mehner took place on October 21-28, 2003. The Division of Occupational Licensing filed accusations alleging breaches of fiduciary duties, violations of the dual agency statute, and various misrepresentations arising out of the sale of an Anchorage residence in 1999. A decision by the hearing officer is expected in the next few months.

Prior to the hearing, the hearing officer denied the Division's motion for summary judgment,

determining that Mehner was not bound by the findings of fact and conclusions of law entered by a superior court judge in 2002 involving the same transaction. The hearing officer did not apply collateral estoppel because there was no final judgment in the civil action, due to the fact that the case settled before the punitive damages trial began. AAG Robert Auth represented the Division in this proceeding.

ACS' Federal Court Appeal of RCA Arbitration Decision Dismissed

On October 14, Judge Holland agreed to accept a stipulation to dismiss ACS' appeal of an RCA arbitration decision. This federal court action was filed by ACS in 2000 challenging an order issued by the Regulatory Commission of Alaska (RCA) in its implementation of the Telecommunications Act of 1996. Under the Act, state public utility commissions such as the RCA are required to implement competition in local telecommunications markets. They do so by reviewing for consistency with federal law interconnection agreements reached through negotiation or arbitration between incumbent telecommunications carriers like ACS and competitors (GCI in this case). The Act also provides for exclusive federal court review of these state commission decisions.

After being named a defendant in federal court, the RCA filed a motion to dismiss, claiming Eleventh Amendment immunity. At the time the motion was filed, the federal circuit courts were split on whether state commissions were immune from suit under the Eleventh Amendment, notwithstanding an act of Congress to the contrary. After Judge Holland denied the RCA's motion, an immediate appeal was taken to the Ninth Circuit Court of Appeals.

After briefing to the Ninth Circuit was complete, the U.S. Supreme Court issued its decision in *Verizon v. Public Service Commission*, 122 S. Ct. 1753 (2002). In

Verizon, the Supreme Court held that federal district court challenges to state commission decisions under the Act can be maintained against state commissioners under the *Ex parte Young* doctrine. This doctrine is a limited exception to state sovereign immunity which allows federal court challenges against state officials to proceed where ongoing violations of federal law are alleged, and the relief requested is only prospective, declaratory and/or injunctive. The Court left unanswered the question of whether state commissions themselves retain sovereign immunity under these circumstances.

Given the Supreme Court's decision in *Verizon*, the RCA agreed at oral argument to allow a substitution of defendants to occur - the RCA Commissioners for the RCA, as a means of allowing the Ninth Circuit to avoid the constitutional question left in *Verizon*. ACS refused the offer.

On March 12, 2003, the Ninth Circuit issued its decision adopting the RCA's suggested disposition of the case by ordering a substitution of defendants. The case was remanded for a determination on the merits.

On remand, ACS determined that the time remaining on its interconnection agreement was inadequate to warrant a continuation of its appeal. The case had been rendered moot with the passage of time. At ACS' request, the parties agreed to dismiss the action. Judge Holland did so on October 14. AAG DeVries represented the RCA in this case, and before the Ninth Circuit.

Regulatory Commission of Alaska

In October, AAG Virginia Rusch worked on two appeals in which she represents the Regulatory Commission of Alaska. In one appeal, Alaska Communications Systems is challenging an order issued after the RCA held a hearing to investigate numerous consumer complaints about delays in getting telephone service.

Among other solutions, the RCA ordered ACS to apply the terms of its existing line extension tariff when requested to extend service facilities. ACS argued that an order of the Federal Communications Commission, issued after the RCA's order, preempted the RCA's discretion to order it to build new facilities for use by its competitor. In a motion to dismiss appeal, the RCA argued that the case should be remanded because the RCA's order was not a final order and ACS' arguments were never presented to the RCA.

In another appeal, Chugach Electric Association is challenging RCA decisions on several ratemaking issues. Briefing of the issues on appeal has not yet begun, but the parties negotiated terms to implement the RCA-ordered rates and begin the refund process.

AAG Rusch also worked on regulations projects for the RCA and assisted the commission by review of orders.

Environmental

Clean Air Act Case Argued Before Supreme Court

The state appeared before the U.S. Supreme Court on Oct. 8, 2003 to argue *ADEC v. EPA*, litigation concerning which agency has the authority to choose the pollution control technology required in an air permit at the Red Dog Mine. The case raises significant federalism issues about the division of authority between the EPA and the states under the Clean Air Act. Several states and other organizations filed amicus briefs in this case. A decision is expected in early 2004.

Conservation Easements Granted at Fairbanks Superfund Site

The Arctic Surplus Superfund site is an area in North Pole where soil has been contaminated by the long-term stockpiling and disposal of surplus military supplies and equipment. The DOD, as generator of the materials, took the lead on a site cleanup under CERCLA. EPA approved a cleanup that relied in part on institutional controls to limit the future use of the site, since it was not cost-effective to remove all the contamination. EPA and DOD asked the state, through DEC, to assist in convincing the private owners of the site to convey conservation easements that would limit their future use of the property. AAG Cameron Leonard assisted DEC in drafting and negotiating the easements. The owners have recently signed the easements. The state will coordinate the acceptance of the easements by DNR, assignment of the management of the easements back to DEC, and recording of the easements.

Greater Prudhoe Bay C-Plan Adjudiatory Proceeding Settled

DEC and the Sierra Club have settled the Greater Prudhoe Bay C-Plan adjudication. The Sierra Club appealed the Greater Prudhoe Bay C-Plan to the DEC Commissioner, and it was scheduled for hearing before Hearing Officer Hemenway. The settlement was based on BP Exploration Alaska's full compliance with crude oil transmission pipeline system leak detection requirements, and BP's amendment to the Greater Prudhoe Bay C-Plan to include a complete list of oil discharge response equipment. The matter was dismissed with prejudice with each party bearing its own costs and fees. AAG Mary Lundquist represented DEC in this matter.

Human Services

Alaska Supreme Court Issues Decisions in CINA Adoption Cases

In October the Alaska Supreme Court issued a published decision and an unpublished decision in two CINA cases, and a decision of note in an ICWA adoption case. AAG Mike handled these appeals.

Vivian P. v. State, DFYS was a CINA case involving a child who suffered from physical and psychological abuse, including abuse stemming from Munchausen's syndrome by proxy; among other maltreatments the child's mother had him unnecessarily and repeatedly admitted to a psychiatric facility and she convinced a doctor to surgically insert a medically unnecessary feeding tube into his stomach.

The superior court terminated the mother's parental rights ruling, under AS 47.10.086(c), that the department was under no duty to make reasonable efforts to reunite the boy with his mother because she had subjected him to circumstances substantially endangering his health or safety. While reversing the trial court's alternative finding that the department had made reasonable pre-termination efforts at reunification, the supreme court affirmed the termination of the mother's rights on the grounds that, under the statute, the trial court correctly excused the department from its statutory duty to make efforts at reunification before seeking termination.

In *Tina S. v. State, DFYS*, an unpublished memorandum opinion, the supreme court upheld the termination of the mother's parental rights based upon her failure to participate meaningfully in her substance abuse-oriented reunification case plan. Such a failure, under

AS 47.10.013, constitutes abandonment of the child. The trial court terminated the mother's rights based on this single ground (apparently not finding sufficient evidence that the mother's underlying substance abuse problem independently caused the child to be in need of aid). The supreme court affirmed the termination, rejecting the mother's argument that she did not need to be treated for substance abuse. The court also rejected the mother's argument that termination was improper because she had never actually harmed her child, holding that under the statute the proper focus is the potential risk of harm, not any incidents of past harm.

Finally, the Department of Law was requested by the supreme court to participate as amicus curiae in *In re Keith M.W.*, an adoption case involving an Indian child. The court issued an opinion holding that relinquishments of parental rights (AS 25.23.180) and consents to adoption (AS 25.23.040-070) are two separate and distinct processes created by the legislature to govern different factual situations. The court held that relinquishments are available to biological parents who wish to give children up to private or state adoption agencies. Relinquishments must involve a complete severance of the parent/child bond; "conditional" relinquishments are not allowed. In contrast, for non-agency adoptions the proper procedure involves a "consent to adopt," in which a biological parent agrees to a specified person or couple adopting the child.

The court construed the purported "relinquishment" signed by the parent to function as a consent to adopt, because it provided that if the child was not ultimately adopted by the specified couple the relinquishment would be void. This issue may have a particular impact on ICWA cases because the time frame in which a parent of an Indian child may retract a relinquishment can be substantially different than the time frame in which the parent may retract a consent to adopt.

Labor & State Affairs

Judge Rejects Discrimination Claim

After a week long trial, U.S. District Court Judge James Singleton rejected a former Child Support Enforcement Division employee's claim that the division's failure to select him for promotion was racially discriminatory. The employee, who now works for another state agency, represented himself at trial and subpoenaed an assortment of current and former state employees – including former Governor Tony Knowles – to testify at trial.

The employee claimed that that one of the managers who participated in the selection process for the promotion had been overheard using a very offensive racial epithet in reference to the employee. The employee asserted that race discrimination was therefore the reason that he was not selected for promotion. Judge Singleton rejected the employee's claims, including the assertion that the manager had used the offensive racial epithet. AAG Dave Jones handled this case.

Court Orders Legislative Employee to Pursue Per Diem Claim Through Administrative Process

Superior Court Judge Morgan Christen ruled that a legislative employee must pursue his claim for per diem payments through the statutory process for making contractual claims against the state before the court will consider his claim. The employee filed suit in superior court, asserting that he is entitled to receive the same per diem payment for service during the legislative session that legislators receive. We moved to dismiss the case because the employee had not pursued his claim through the statutory procedures for presenting claims against the state. After we

moved to dismiss the case, the employee filed a claim under the statutory claims procedures, but has not yet exhausted those procedures. Judge Christen has stayed the superior court suit until the employee completes the statutory claims process. Deputy Attorney General Scott Nordstrand and AAG Dave Jones are handling this case.

Judge Orders Certification of Initiative

Superior Court Judge Mark Rindner ordered Lieutenant Governor Loren Leman to certify an initiative application proposing changes to the method of filling vacancies in Alaska's representation in the United States Senate. The sponsors of the initiative first persuaded Judge Rindner to order Lieutenant Governor Leman to decide within two weeks of the order whether the initiative application was in proper form. Before the two weeks expired, Lieutenant Governor Leman determined, based on advice from the Department of Law, that the application was not in proper form because the proposed legislation was not a proper subject of initiative.

The sponsors sought immediate review of that decision, and Judge Rindner obliged, concluding that a determination whether legislation proposed through the initiative process is a proper subject for initiative under the United States Constitution should not be made until voters adopt the initiative. Judge Rindner therefore ordered Lieutenant Governor Leman to certify the initiative application. AAGs Joanne Grace and Dave Jones handled this case.

New Attorneys Join Section

The Labor and State Affairs section is very pleased to announce that Richard Postma and Linda Kesterson have joined us. Each brings years of experience to the section. Richard previously was with Lane Powell Spears Lubersky and will be focusing on labor and employment matters. Linda comes to us from

the Commercial and Fair Business section of Department of Law and will be advising the Medicaid Rate Advisory Commission. They will provide much-needed assistance in these areas, and we are excited to have them aboard. Welcome Richard and Linda!

Legislation & Regulations

Important Education Regulations To Improve Schools Approved for Filing

During October, the Legislation & Regulations section focused its efforts on editing and approving, as meeting legal standards, several regulations projects important to the state. One of the projects that had significant public interest was a comprehensive set of regulation packages to implement federal "No Child Left Behind" requirements for school accountability. Successful processing of the project required close coordination between the Legislation/Regulations Section, AAG Neil Slotnick, and the staff of the Department of Education and Early Development.

The section reviewed regulations important to the Governor's goal of increasing oil and gas exploration and production. These included oil and gas production tax regulations addressing prevailing value, return on investments, and the recently enacted exploration credit. Thanks to AAG Bonnie Harris for her careful legal editing of these projects.

Other regulations processed during October 2003 included: rural airports (Department of Transportation and Public Facilities); minimum plumbing standards, mechanical inspection, and trainee certification for plumbers and electricians (Department of Labor and Workforce Development); child work permits (Department of Labor and Workforce Development); GED test scores (Department of Labor and Workforce Development); the hunting of Dall sheep (Board of Game); the

harvest of blue king crab in the Pribilof Islands area (Board of Fisheries); the Uniform System of Accounts for telecommunication utilities (Regulatory Commission of Alaska); criminal justice information (Department of Public Safety); licensure by the Board of Nursing (Department of Community and Economic Development); Alaska Senior Assistance Program (Department of Health and Social Services); application of pesticides and forestry vegetation management programs (Department of Environmental Conservation); and certain election precinct boundaries (Division of Elections). Several AAG's contributed their hard work on these important regulations projects.

The section continued preparations of legislation for consideration for the governor's bill package.

Natural Resources

U.S. Supreme Court Declines Review in *Carlson*, Non-Resident Fishing Fees Case

On October 14, the United States Supreme Court denied a petition for writ of certiorari in *Carlson v. Commercial Fisheries Entry Commission*. The *Carlson* case is a nineteen-year-old class action that challenges the state's practice of charging nonresident commercial fishers higher fees for annual permits and licenses than it charges resident fishers.

The *Carlson* class had asked the Court to review several decisions made by the Alaska Supreme Court last March. In its third decision in this dispute, the Alaska court had affirmed an earlier ruling that resident-nonresident fee differentials do not implicate the Commerce Clause of the U.S. Constitution. The court had also affirmed that under the Privileges and Immunities Clause, resident commercial fishers may be credited with the amount that the state spends to support commercial fisheries from

revenues that are derived from petroleum production. In its petition, the class challenged both of these rulings. In 1997, the class had filed a similar petition when the Alaska Supreme Court originally entered these rulings. The U.S. Supreme Court denied that petition.

In addition to defending the Alaska court's rulings, the state argued that appeal should not be taken because there has not yet been a final ruling on the constitutionality of the state's fee differentials. The Alaska Supreme Court remanded that question to the superior court, and the parties will be briefing it in November and December. AAG Steve White is representing the state in this case.

State and Kenai Peninsula Borough Settle Land Selection Appeals

On October 23, the State and the Kenai Peninsula Borough executed a settlement agreement and stipulation to dismiss the borough's administrative appeal in *KPB v. State*, No. 3KN-02-685 CI. The KPB had challenged DNR's decision on two of the borough's municipal selections. DNR's decision on both parcels, the Juneau Creek and Gray Cliffs selections, is guided by the Kenai Area Plan. DNR ruled that it could not make a final decision on the Juneau Creek selection until the Department of Transportation determines the realignment route of Sterling Highway at Cooper Landing, a process controlled by the Area Plan. DNR approved the Gray Cliffs selection, but determined to reserve the sand and gravel.

Under the settlement, the parties will postpone further action on the Juneau Creek selection until DOT makes a final decision on the Sterling Highway reroute. If DOT routes the highway north of the Kenai River, DNR will approve the selection, subject to the plan's requirements for scenic buffers and public access. The KPB will receive acreage credit for buffer areas retained by the State. With

regard to the Gray Cliffs parcel, DNR will propose and defend an amendment to the KAP, allowing conveyance to the borough without reserving the sand and gravel. The KPB would then allow material to be removed by the State at no charge for marine projects in a specifically described area of Lower Cook Inlet. The agreement and stipulation are subject to approval by Superior Court Judge Hal Brown. AAG John Baker represents the State in this matter.

Opinions, Appeals & Ethics

Opinion Issued on Senate Vacancy Initiative Application

On October 20, 2003, we issued an opinion to the Lieutenant Governor on the initiative application concerning the process to fill a vacancy in the office of United States Senator. The opinion recommended that the Lieutenant Governor not certify the application because it contained subject matter that is restricted from enactment through the initiative process.

The Seventeenth Amendment to the United States Constitution governs the process for filling a vacancy in the United States Senate. The opinion concludes that the plain meaning of the text of the Seventeenth Amendment, and available guidance from decisions of the United States Supreme Court, commit the process of filling a vacancy in the Senate to the sole discretion of the state legislature. The proposed initiative would attempt to exercise authority vested solely in the Alaska Legislature in its representative capacity (as compared to its law-making capacity), directly by the people through the initiative, and it would disable the legislature from exercising those powers. For these reasons, we concluded that the initiative was not in the "proper form" and should not be certified.

The sponsors of the initiative filed a lawsuit before the opinion was issued seeking an order requiring the Lieutenant Governor to certify the initiative application. As discussed in the Labor & State Affairs report, the court ordered that the Lieutenant Governor to certify the initiative application. The court did not decide the Seventeenth Amendment issue, concluding that the constitutional questions concerning the initiative should be decided post-election. The Lieutenant Governor certified the initiative on October 31 and petition booklets were promptly issued.

We have filed an appeal to the Alaska Supreme Court and requested expedited consideration so that there can be a decision by the court before the deadline for certifying the November 2004 general election ballots to the printer.

AAGs Jim Baldwin, Barbara Ritchie, Joanne Grace in Opinions, Appeals & Ethics, and Dave Jones in Labor & State Affairs worked on this matter.

Ethics Opinion Issued Regarding Friends Of the Alaska Governor's Mansion

State Ethics Attorney Paul Lyle issued an advisory ethics opinion concerning various aspects of the Friends of the Alaska Governor's Mansion, Inc. The First Lady is forming a charitable and educational non-profit corporation for the purpose of educating the public about the governor's house and to raise funds for its preservation, maintenance and enhancement.

The opinion discusses numerous issues concerning the appointment of public officers to the board of directors and the use of the governor's house for fundraising events or board meetings. It concludes that a public officer who serves on the board of a charitable organization may engage in fundraising for that charity, but that in so doing they must make clear that they are acting in their

personal capacity. The opinion further concludes that the First Lady may use the governor's house for charitable fundraising events for the Friends of the Mansion, and for board meetings. However, public official board members who attend a charitable fundraising event at the executive residence may not personally solicit for funds for the Friends of the Mansion while they are on the premises.

Torts & Workers' Compensation

Alaska Supreme Court denies Petition For Rehearing in Denali Highway Negligence Case

The Alaska Supreme Court denied the plaintiffs' petition for rehearing in *Kiokun v. State*, which involved three deaths on the Denali Highway several years ago. The case is being sent back to the superior court for entry of judgment in the State's favor. The court's July 2003 opinion provided discretionary function immunity for Trooper decisions about the initiation of search and rescue. This case was handled by AAGs Venable Vermont and Dave Jones.

Criminal Division

ANCHORAGE

The Anchorage office presented 33 cases to the grand jury during the month. We tried only one case in October, largely because the Public Defender's Conference, the Judge's Conference and the District Attorneys Conference each took place during separate weeks in October.

In grand jury action, there were two murder cases. A man was indicted for murder in the second degree, for shooting a friend. Another

man was indicted for murder in the first degree for killing and robbing the victim.

There were also two interesting property cases. Two men were indicted by a grand jury for theft in the first degree. In less than a week, the men used forged checks totalling about \$250,000 to purchase two 2003 Hummers and a 2003 PT Cruiser from a local dealership. In another property case, a man was indicted by a grand jury for criminal mischief in the third degree for being the getaway driver for juveniles who vandalized Dimond High School.

In an ironic case, the owner of a local car dealership was indicted for felony assault, after running a red light and causing a crash. The man apparently had a seizure at the time, however, he had a history of such seizures and his driver's license had been suspended for that as of the time of the collision.

Janene Guidroz was convicted, by a jury, of assault in the second degree for battering her child, causing two skull fractures that impaired the child's vision and motor skills. ADA Marcy McDannel tried the case for the state.

Randy Chase, a foster parent, was sentenced to 10 years with five years suspended for two counts of possession of child pornography. A 17-year-old foster child found a videotape belonging to Chase, and saw Chase engaged in sexual conduct with an 8-year-old boy and another boy. The 8-year-old called Chase "daddy" on the tape recording. The foster child called police and turned the videotape over to them. Police found 15,000 additional pornographic photographs of children on Chase's computer.

BARROW

After a five-day jury trial, Vincent Bodfish was convicted of two counts of second degree sexual assault. Bodfish had provided alcohol to a 17-year-old woman, who became

incapacitated, and then he raped her. Another man was acquitted for sexual assault in the first degree, after a jury trial. After a four-day jury trial, Jamon Benson was convicted of driving under the influence. Benson had successfully postponed his case for 21 months without cause.

Johnson Ahvik was sentenced to 20 years for attempted sexual abuse of a minor in the first degree. Ahvik has been convicted twice for sexual assaulting other women.

BETHEL

October was a bad month for trials in Bethel. A man was found not guilty of reckless driving. A man was found not guilty of attempted sexual assault in the second degree and attempted sexual assault of a minor in the third degree. Another man was found not guilty of violating conditions of release.

In the grand jury, sexual abuse of minors was prevalent, with five men indicted for that crime in separate cases. In other cases, two men were indicted for escape; one for felony assault; five for burglary or theft; one for witness tampering; and a woman was indicted for a felony drug crime. Finally, two men and one lodge business were indicted for bootlegging.

DILLINGHAM

William Yohak was sentenced to 99 years for two counts of murder in the second degree. After sexually assaulting a 14-year-old girl in Manokotak, Yohak strangled her and shot her in the head with a .22. A few days later, he shot and killed a man. When troopers initially questioned Yohak about the killings, he said he knew nothing, and then later changed his story. Yohak admitted the offenses after physical evidence poked holes in his story. He plead guilty to two counts of murder in the second degree. The sentences were imposed concurrently, but he is not eligible for parole

until he has served 40 years. ADA John Skidmore represented the state.

FAIRBANKS

This report for Fairbanks contains activity for both September and October. Local Borough Assemblyman Richard Solie was arrested and convicted of for driving under the influence. After Solie's change of plea, the District Attorney's Office learned of a prior 1982 conviction in Vermont for DUI. This is being investigated further.

The Alaska Court of Appeals upheld convictions against three defendants arrested during a June 2000 methamphetamine lab raid. The defendants have been free pending the outcome of their appeals.

A Fairbanks judge has granted the mother of a 15-year-old boy who was fatally beaten in 1997 more than \$6.2 million for her wrongful death suit against the four men who were convicted of the murder.

The Fairbanks Grand Jury indicted 21 individuals in September and 45 individuals in October. Among those indicted were a man for the murder of two local Fairbanks men; and another man for the murder of his girlfriend in Rampart. In October, Daniel Hassler was convicted by a Fairbanks jury of firing shots in the air at a crowded local nightclub.

JUNEAU

DA Pat Gullufsen attended the National Domestic Violence Conference, and ADA Jack Schmidt attended the Trial I course at the National Advocacy Center. With the judges, public defenders and prosecutors all having conferences in October, there were no felony jury trials in the Juneau District Attorney's Office.

The Child Advocacy Center in Juneau has been working closely with the Juneau District

Attorney's Office, primarily with paralegal, Carrie Hulse, to refine and improve its child interviewing capabilities. The CAC is now an integral and very effective asset for the investigation and prosecution of child victim cases, and also those cases where children are non-victim witnesses throughout northern Southeast Alaska.

KENAI

Visiting prosecutor, Mike Gray, convicted a defendant of driving under the influence in Kenai, with a blood-alcohol level of .084%.

The grand jury indicted two defendants on multiple counts of possession of child pornography as well as one count each of distribution of the pornography. Among the other indictments this month were a second-degree murderess and an attempted murderer.

The movie line of the month goes to the defendant who returned home with a gun and said to his girlfriend, "There's three things I've got to do." He then pointed the gun at her cat and killed it. He next pointed the gun at her and said, "Now I only have two things left."

Although his time at the Kenai District Attorney's Office is waning, ADA Scot Leaders has not lost any of his zeal. He fought back co-defendants' motions to suppress evidence and to sever their trials, with the help of OSPA and their willingness to take the issue to the Court of Appeals. After much motion work, the co-defendants pled.

KETCHIKAN

ADA Dan Schally won a drunk driving jury trial in Craig in October. The defendant tried to put on a necessity defense but the defendant's own testimony torpedoed that effort to such a degree that the court said he hadn't even met the very low "some evidence" standard and refused to give the necessity instruction.

KODIAK

A Kodiak man was given a composite sentence of 48 months in jail with 39 months suspended after being convicted of vehicle theft and driving while intoxicated. This defendant was also placed on probation for 5 years, including the condition that he consume no alcohol at all during the term of this probation.

A Kodiak man was indicted for sexual assault and sexual abuse of a minor following allegations that he sexually assaulted a 14-year-old Kodiak girl at an alcohol party at a friend's house. This defendant had been brazen enough to videotape the sexual assault for the amusement of his friends, and careless enough to leave approximately 5 seconds of the assault on the video tape when he later attempted to erase it. At the time of his indictment this defendant was already serving a 25-month sentence following his conviction for felony drug and weapons charges earlier in the year.

The October grand jury indicted a Kodiak man and three-time felon for felony assault and felony possession of a concealable weapon following an incident in which he threatened members of his family by pulling a revolver from his pants and pointing it at them during a card game. The defendant remains in custody pending a December trial date.

KOTZEBUE

A Kobuk woman was arrested for stealing checks from the Kobuk Post Office and later cashing them. While those offenses were being investigated, the VPSO found the defendant hiding in the Post Office after closing hours. She has also been charged with burglary.

A man was arrested at his camp near Kotzebue after troopers responded to a non-specific call for help at the camp where they

found the defendant and his brother intoxicated and engaged in an altercation. While the troopers were attempting to sort that out, they found the body of an 18-year-old man in a nearby slough. The young man had drowned while intoxicated, and witnesses reported that the defendant had furnished the alcohol to the deceased.

Jason Lee was convicted of felony driving under the influence, and acquitted of a refusal count, after a week long trial in Kotzebue. Defense attorney Eugene Cyrus promptly filed a packet of post-verdict motions, so the case may be with us for a while.

NOME

A two-month investigation into the murder of 19-year-old Sonya Ivanoff culminated in the arrest of Nome police officer, Matthew Owens. Ivanoff's body was found in mid-August two miles north of Nome. She had been shot in the head. The case was originally investigated by the Nome Police Department, but the Alaska State Troopers took over the investigation after Owens became a suspect. The Alaska Bureau of Investigation committed an incredible amount of resources and personnel to the investigation and countless hours were spent chasing down leads. Over 150 interviews were conducted. Nineteen witnesses testified at grand jury and Owens was indicted for the murder as well as tampering with physical evidence. Owens' arrest complicates several other cases; for example, he is the principal witness in the Blodgett homicide case charged in September. Special ADA Rick Svobodny has been assigned to prosecute the case.

Petitions & Briefs of Interest

Minor consuming; equal protection. Judge Murphy ruled that the mandatory probation requirement for first offenders convicted of

minor consuming alcohol (MCA) violated equal protection because the statute requires younger offenders to remain on mandatory probation longer than older offenders. In an interlocutory petition for review, the state argued that the statute is not violative of equal protection: the state has a compelling interest in curbing underage drinking and a substantial relationship exists between this interest and placing the offending minor on mandatory probation until age 21. The court of appeals has granted the state's petition and has ordered full briefing on the issue. If you have an MCA case in which a judicial officer rules that the statute violates equal protection, please contact OSPA immediately. If OSPA learns about the adverse ruling in a timely fashion, it can file a motion to consolidate the new case with *Morgan*. *State v. Morgan*, A-8691.

Briefs of Interest

Dog as a dangerous instrument. The state argues to the court of appeals that sufficient evidence existed for the jury to find that a Rottweiler was used as a "dangerous instrument," for purposes of the third-degree assault statute, to recklessly place the victim in fear of imminent serious physical injury. In the case, the defendant lured the victim to the defendant's kitchen, where the Rottweiler (a dog the victim was afraid of) was sitting in such a manner that the victim could not leave without going past the dog. The defendant then coerced the victim into signing some false documents. *Hurd v. State*, A-8112.

Ineffective assistance; habeas standard. In an appeal from the denial of a federal habeas application, the state argues to the Ninth Circuit Court of Appeals that the Alaska Court of Appeals correctly decided that to the extent the defense attorney was ineffective in preparing for the trial of the defendant for murder, the defendant had suffered no prejudice from the attorney's lack of preparation. The state argues that in the

factual context of the case the Alaska Court of Appeals' decision does not meet the criterion for habeas relief – an unreasonable application of U.S. Supreme Court case law on the subject. *Jackson v. Pugh*, No. 03-35479.

Seriousness of crime v. double punishment.

The defendant was convicted of first-degree murder, robbery, and vehicle theft for robbing and killing a cab driver and taking the victim's cab. The trial court imposed a sentence of 99 years for the murder and concurrent sentences for the robbery and vehicle theft. The state argues that, even though the defendant was sentenced for murder, aggravating both the robbery and vehicle-theft sentences on the basis of the victim's death does not punish the defendant more than once for the same conduct. *Andrus v. State*, A-8547.

Statute and Rule Interpretations

Alaska Evidence Rule 606(b) and pre-deliberation evidence. Alaska Evidence Rule 606(b) generally excludes from post-trial motions or proceedings evidence of what jurors stated or thought during their deliberations. The court of appeals interpreted the rule's prohibition to also extend to evidence offered of what jurors stated or thought during the trial before they began deliberating. *Larson v. State*, Op. No. 1904 (Alaska App., October 24, 2003).